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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

JOANNE BURR,

Petitioner,

v.

HASBROUCK HEIGHTS POLICE DEPARTMENT; GEORGE NETELKOS; and COREY LANGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a police officer's community care-taking function permit him to enter a person's house without a warrant and remove her to a psychiatric hospital when she has threatened no one, is no threat to herself and has already turned off the music which was the claimed basis for the warrantless entry into her house?

2. Are police officers entitled to immunity from civil liability if they have no knowledge of clear statutory authority governing their conduct?

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Third Circuit entered its ruling on May 17, 2005. Plaintiff petitioned for rehearing *en banc* on May 31, 2005. The Court of Appeals denied the petition on June 17, 2005 (App. C). The Supreme Court is authorized to consider this case pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED IN THE CASE

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted

unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.J.S.A. 30:4-27.1. Legislative findings and declarations

a. The State is responsible for providing care, treatment and rehabilitation services to mentally ill persons who are disabled and cannot provide basic care for themselves or who are dangerous to themselves, to others or to property; and because some of these mentally ill persons do not seek treatment or are not able to benefit from treatment provided on an outpatient basis, it is necessary that State law provide for the voluntary admission and the involuntary commitment of these persons as well as for the public services and facilities necessary to fulfill these responsibilities.

b. Because involuntary commitment entails certain deprivations of liberty, it is necessary that State law balance the basic value of liberty with the need for safety and treatment, a balance that is difficult to effect because of the limited ability to predict behavior; and, therefore, it is necessary that State law provide clear standards and procedural safeguards that ensure that only those persons who are dangerous to themselves, to others or to property, are involuntarily committed.

c. It is the policy of this State that persons in the public mental health system receive inpatient

treatment and rehabilitation services in accordance with the highest professional standards and which will enable those hospitalized persons to return to their community as soon as it is clinically appropriate. Further, it is the policy of this State that the public mental health system shall be developed in a manner which protects individual liberty and provides advocacy and due process for persons receiving treatment and insures that treatment is provided in a manner consistent with a person's clinical condition.

d. It is the policy of this State to encourage each county or designated mental health service area to develop a screening service and a short-term care facility which will meet the needs for evaluation and acute care treatment of mentally ill persons in the county or service area. The State encourages the development of screening services as the public mental health system's entry point in order to provide accessible crisis intervention, evaluation and referral services to mentally ill persons in the community; to offer mentally ill persons clinically appropriate alternatives to inpatient care, if any; and, when necessary, to provide a means for involuntary commitment. Similarly, the State encourages the development of short-term care facilities to enable a mentally ill person to receive acute, inpatient care in a facility near the person's community. Development and use of screening services and short-term care facilities throughout the State are necessary to strengthen the Statewide community mental health system, lessen inappropriate hospitalization and reliance on psychiatric

institutions and enable State and county facilities to provide the rehabilitative care needed by some mentally ill persons following their receipt of acute care.

N.J.S.A. 30:4-27.2. Definitions

Text of section effective until September 20, 2005

As used in this act:

h. "Dangerous to self" means that by reason of mental illness the person has threatened or attempted suicide or serious bodily harm, or has behaved in such a manner as to indicate that the person is unable to satisfy his need for nourishment, essential medical care or shelter, so that it is probable that substantial bodily injury, serious physical debilitation or death will result within the reasonably foreseeable future; however, no person shall be deemed to be unable to satisfy his need for nourishment, essential medical care or shelter if he is able to satisfy such needs with the supervision and assistance of others who are willing and available.

i. "Dangerous to others or property" means that by reason of mental illness there is a substantial likelihood that the person will inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future. This determination shall take into account a person's history, recent behavior and any recent act or threat.

m. "In need of involuntary commitment" means that an adult who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property and who is unwilling to be admitted to a facility voluntarily for care, and who needs care at a short-term care, psychiatric facility or special psychiatric hospital because other services are not appropriate or available to meet the person's mental health care needs.

r. "Mental illness" means a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome or developmental disability unless it results in the severity of impairment described herein. The term mental illness is not limited to "psychosis" or "active psychosis," but shall include all conditions that result in the severity of impairment described herein.

N.J.S.A. 30:4-27.3. Application of standards and procedures

The standards and procedures in this act apply to all adults involuntarily committed to a short-term care facility, psychiatric facility or special psychiatric hospital and all adults voluntarily admitted from a screening service to a short-term care facility or psychiatric facility. The standards and procedures in this act shall not apply to adults

voluntarily admitted to psychiatric units in general hospitals or special psychiatric hospitals, except as provided in section 11 or 20 of this amendatory and supplementary act [referring to N.J.S.A. 30:4-27.11 and N.J.S.A. 30:4-27.20].

N.J.S.A. 30:4-27.6. Bases for custody of person and transport to screening service by law enforcement officer

A State or local law enforcement officer shall take custody of a person and take the person immediately and directly to a screening service if:

a. On the basis of personal observation, the law enforcement officer has reasonable cause to believe that the person is in need of involuntary commitment;

b. A mental health screener has certified on a form prescribed by the division that based on a screening outreach visit the person is in need of involuntary commitment and has requested the person be taken to the screening service for a complete assessment; or

c. The court orders that a person subject to an order of conditional discharge issued pursuant to subsection c. of section 15 of this act [N.J.S.A. 30:27-15] who has failed to follow the conditions of the discharge be taken to a screening service for an assessment.

The involvement of the law enforcement authority shall continue at the screening center as long as necessary to protect the safety of the person in custody and the safety of the community from which the person was taken.

N.J.S.A. 30:4-27.7. Law enforcement officers, screening service or short-term care staff, emergency services or medical transport persons or their employers; immunity from liability for assessment, custody, detention and transportation

> a. A law enforcement officer . . . , acting in good faith pursuant to this act who takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment is immune from civil and criminal liability.

For the purposes of this subsection, "emergency services or medical transport person" means a member of a first aid, ambulance, rescue squad or fire department, whether paid or volunteer, auxiliary police officer or paramedic.

N.J.A.C. 10:31-1.3. Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

> "Community gatekeeper" means an individual such as a police officer, religious leader, family member or other person, who may refer an individual for mental health services.

"Involuntary commitment" means the procedure for enacting treatment of an adult who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property, and who is unwilling to be admitted to a facility voluntarily for care, and who needs care at a short-term care facility, psychiatric facility or special psychiatric hospital because other services are not appropriate to meet the person's mental health care needs.

"Mental illness" means a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgement, behavior or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome or developmental disability unless it results in the severity of impairment as defined herein.

"Screening" means the process by which it is ascertained that the individual being considered for commitment meets the standards for both mental illness and dangerousness as defined in P.L. 1987, c.116 (N.J.S.A. 30.4-27.1 et seq.), and that all stabilization options have been explored or exhausted.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

On Thursday, July 12, 2001, petitioner Joanne Burr was 47 years old. She resided in a one family house with her mother and her son. Around 6:30 p.m. she left the kitchen in which she was simmering seafood in a white wine sauce, and she went upstairs to a spare room to sing along with recorded religious music.

Burr heard footsteps downstairs at about 7:30 p.m. She turned off the music, looked to her left and saw a light coming up the stairs. "A big figure" entered the room in a police uniform, carrying a flashlight in his hand and with a "very angry" expression on his face. He did not identify himself. This was respondent George Netelkos.

Netelkos spoke with Burr. Netelkos told Burr that an unidentified neighbor had complained about the loudness of the music. Netelkos did not know who had made the complaint.

According to respondents, Burr told Netelkos to lower the music, which he did. (According to petitioner, she turned off the music and asked Netelkos "to please leave." This difference over who turned off the music is not material.) Netelkos did not respond, and Burr twice more demanded that he leave. Netelkos instead grabbed Burr's arm and held it tightly. Burr said, "You're not allowed in my house." Netelkos maintained his grip. Finally, he let go. Burr sat down "very frightened" and "getting even more frightened." Netelkos acknowledged that Burr was seated, that her voice was not elevated and that it was "calm, natural."

Two neighbors saw the police car and the open door to Burr's house. They came into the house; both found the scene on the second floor and Netelkos' behavior frightening. Nancy Fulton testified that, again and again, she told people, "You're not going to believe what I observed." She testified that Burr was not a danger to anyone, did not threaten anyone and did not threaten to commit suicide and that she "looked upset and almost scared."

Tina Edwards also entered Burr's house and came to the second floor. She testified that Burr "sounded scared, she sounded very threatened," but "she was making perfect sense." To Edwards, Burr seemed "normal and rational" and nothing suggested that Burr was a danger to herself or to anyone else. In Edwards' words, "They couldn't have seen anything for them to think they had to barge in . . ."

Netelkos perceived that which Fulton and Edwards saw to be nothing more than a blank stare. When he asked questions of Burr, she did not respond other than to ask him to leave. Netelkos smelled liquor. Netelkos called a psychiatric help line, but Burr refused to speak to a counselor. Netelkos concluded from her refusal that Burr was a threat to herself.

In 10 years on the Hasbrouck Heights police force (population 11,662), Netelkos had involuntarily committed people to a psychiatric hospital "four or five times" without the assistance of a counselor. Although he had known of Joanne Burr because of an incident between her and her sister a year earlier and because of a second incident in which a neighbor had accused Burr a year and a half earlier of making a harassing phone call, Netelkos had no personal knowledge of either incident and recalled nothing noteworthy about either.

Yet, based on his knowledge of those two incidents, Netelkos concluded that Burr "quite possibly could have been a nuisance." After the music was turned off, Netelkos concluded that Burr was acting irrationally because she was quoting the Bible, not acknowledging him and looking at him with what he characterized as a "blank stare." Although Netelkos noted alcohol on Burr's breath, she was neither drunk nor intoxicated and the liquor did not affect her ability to walk.

As time passed, Netelkos eventually hollered, "Put your shoes on." Burr replied, "No, I'm not going anywhere with you." Netelkos hollered, "Put on your shoes" and, again, Burr responded, "No, I'm not going anywhere with you." She just "sat there and it was a few minutes after that, all of a sudden, there was another policeman in the door with a flashlight."

Netelkos testified that, while he was waiting for the ambulance, Burr "wasn't doing too much physically. She was yelling and just agitated and adamantly opposed to going to the hospital." "[S]he never threatened the officers or to harm to herself. She did not stagger or fall. By Netelkos' own admission, he "was treating her as if she was a victim . . . as if she might have been a harm to herself or others." He "didn't feel in good conscience it was safe to leave her alone without at least speaking to a counselor, getting some type of help, and she refused to speak to a counselor."

Burr asked Netelkos and a later-arriving officer, Corey Lange, to leave, but they did not. She left the second floor and walked downstairs where she found more men coming in the front door with a stretcher. The officers grabbed her, put her forcibly onto a stretcher and placed the stretcher into the back of an ambulance.

Netelkos knew that the police department had general orders on "the subject of determining whether persons should be involuntarily committed" by the authorities although he did not receive a separate copy of that order. He did not recall any supervisor ever discussing "the standards and procedures to be followed in determining whether someone should be involuntarily committed.

The District of New Jersey, *per* Hon. William H. Walls, U.S.D.J., held that the conduct of Netelkos and Lange was "objectively reasonable," and he granted their motions for summary judgment. He sustained Netelkos' entry "to locate and abate the noise nuisance." He sustained respondents' seizure of petitioner upon a finding that Burr "posed a danger to herself or others."

The District Court had subject matter jurisdiction of petitioner's federal claims under 28 U.S.C. §§ 1331 and 1343 and under 42 U.S.C. § 1983. It had jurisdiction of her state law claims under 28 U.S.C. § 1367.

The Court of Appeals for the Third Circuit affirmed. It reasoned that the evidence did "not suggest that disturbance" involved an "immediate, ongoing and highly objectionable nuisance" within *United States v. Rohrig*, 98 F.3d 1506, 1522, 1525 n.11 (6th Cir. 1996). It assumed that the entry without a warrant was unreasonable and violated Burr's rights. Nevertheless, it sustained the warrantless entry into Burr's house on the basis that Burr could not show that the law had placed respondents on notice that their conduct was unlawful, citing *Brosseau v. Haugen*, __ U.S. __, 160 L. Ed. 2d 583, 125 S. Ct. 596, 599 (2004), in turn citing *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

The Court of Appeals also held that it was reasonable for Netelkos and Lange to believe that Burr "posed an imminent threat of bodily harm to herself," 131 Fed. Appx. at 801 n.1.

REASONS FOR GRANTING THE PETITION

Netelkos ordered Burr's seizure because he concluded that she was dangerous to herself. The New Jersey statute permitting involuntary commitments, N.J.S.A. 30:4-27.2(h) and its implementing regulation, N.J.A.C. 10:31-1.3, define "Dangerous to self" to mean that, for respondents to believe they had authority to involuntarily commit Burr, respondents had to present evidence that Burr had threatened or attempted suicide or serious bodily harm, or that she had behaved in a way which indicated that she could not satisfy her need for nourishment, essential medical care or shelter so that it was probable that substantial bodily injury, serious physical debilitation or death would result within the reasonably foreseeable future.

Respondents do not and have not made this claim. Burr was simply singing along with recorded liturgical music as she was preparing dinner in her own home. Whatever else her behavior reflected — even if she was playing her music too loudly, it did not and could not suggest that she was "dangerous to (her)self."

The statute is clear and unambiguous; it was effective in April 1989, and it was amended in 1994 and 1995. Respondents did not claim in the District Court or in the Court of Appeals that this statute or regulation were ambiguous. They cited other portions of the statute to assert immunity.

This Court has suggested that police officers have a "community care taking function," *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Netelkos entered Burr's house with no warrant to abate a noise complaint. Once he accomplished that purpose, and regardless of who turned off the music, his role as a community care taker was complete.

Respondents justify their subsequent conduct on the claims that Burr smelled of alcohol, that she had a blank stare on her face and that she would not speak to a psychiatric counselor. It is not illegal in New Jersey to drink liquor, particularly in one's own home. Burr was not driving a car. What respondents characterize as a "blank stare" was depicted by neighbors — who knew petitioner — as fear of Netelkos and what he might do (and later did). Netelkos' testimony confirms this:

> Q What did you, Miss Burr and Police Officer Lange do for those ten minutes or so until the ambulance arrived?
>
> A Just tried to tell her to relax and calm down and we were there to help her, we would have someone there that was on the way to help her.
>
> Q What was she doing physically during that wait?
>
> A Physically, she was – she wasn't doing too much physically. She was yelling and just agitated and adamantly opposed to going to the hospital.

Q What conduct or words demonstrated to you that she was a danger to herself or to others? Did she threaten either you or the other officer?

A She never threatened us.

Q Did she threaten to do herself harm?

A She never verbally threatened to do herself harm, no.

Q Did she act in a way that looked like she was going to harm herself?

A She acted in a way that she possibly could have.

Q Was it something important enough to write on here other than what you described to me before. Did she pick up a knife or pick anything up and demonstrate an intent to hurt herself?

A No, nothing of that nature.

Q Did she break anything in the house while you were waiting with her?

A Not that I recall.

Q Did she stagger or fall?

A She did not fall.

Q Did you write down anywhere that she was staggering?

A I didn't write anywhere that she was staggering.

Respondents justify their conduct based upon authority conferred by N.J.S.A. 30:4-27.2(r) and N.J.A.C. 10:31-1.3. This statute and regulation specifically exclude simple alcohol intoxication from the definition of "mental illness," and respondents claim nothing more. New Jersey recognized the need for clear standards to justify those who contemplated involuntary commitment of a person they considered to be in need of protection, N.J.S.A. 30:4-27.1(b). It created and codified them. These standards are consistent with the immunity this Court confers upon public officials charged with knowledge of the laws and regulations under whose authority they claim to be acting.

The Court of Appeals concluded that respondents could reasonably believe that Burr "posed an imminent threat of bodily harm to herself," 131 Fed. Appx. at 801 n.1. This conclusion is justified not by the New Jersey statute, not by its regulation and not by the evidence that Burr was sitting silently in a chair, blankly staring at Netelkos and asking him loudly and repeatedly to leave.

N.J.S.A. 30:4-27.7 immunizes police officers who take reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment. This immunity requires evidence justifying the conduct of the officers claiming immunity. There is no such evidence in this case. Public officials who are oblivious to or ignorant of the law governing their conduct cannot claim immunity, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

N.J.S.A. 30:4-27.2(m) defines "In need of involuntary commitment" to refer to adults who are mentally ill, whose mental illness causes him or her to be dangerous to self, to others or to property, who is unwilling to be admitted to a

facility voluntarily for care, and who needs care at a short-term care, psychiatric facility or special psychiatric hospital because other services are not appropriate or available to meet his or her mental health care needs.

Respondents are entitled to immunity if and only if their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known, *Harlow v. Fitzgerald, supra* at 818. *See also Behrens v. Pelletier*, 516 U.S. 299, 303 (1996), *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The New Jersey statute is clear, and respondents - who had involuntarily committed others on prior occasions on its authority - should have known it.

Burr's conduct, even according to Netelkos, does not meet this standard. It particularly does not meet this standard on summary judgment in which the Court disregarded the deposition testimony of Burr's neighbors.

This Court first referred to the "community care taking function" of police officers in *Cady v. Dombrowski, supra*, more than 30 years ago. The parameters of that function have since sifted through lower state and federal courts. *Compare, e.g., United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005), *United States v. Rohrig*, 98 F.3d 1506, 1519 (6th Cir. 1996) and *State v. DiLoreto*, 850 A.2d 1226, 1233 (Sup. Ct. N.J. 2004), with *Commonwealth v. Thurman*, 872 A.2d 838, 840-41 (Super. Ct. Pa. 2005). This Court should clarify the limits of the doctrine. This petition presents an appropriate record with which to do so.

Petitioner is aware of no case in which police officers were entitled to immunity from civil liability despite total ignorance of the clear statutory authority governing their

conduct. Because lower courts are encouraged if not required to address claims of immunity early in the litigation, it is important to clarify that immunity is authorized only if the official acts in good faith and that good faith, in turn, is determined by reference to governing statutes and regulations, not just to an official's personal notion of what is required.

CONCLUSION

For the preceding reasons, petitioner requests that this Court grant her petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 17, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1121

JOANNE BURR,

Appellant,

v.

HASBROUCK HEIGHTS POLICE DEPARTMENT; GEORGE NETELKOS; COREY LANGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 01-cv-03296
District Judge: The Honorable William H. Walls

Argued April 4, 2005

Before BARRY, AMBRO, and COWEN, *Circuit Judges*

(Filed: May 17, 2005)

Appendix A

OPINION

BARRY, *Circuit Judge.*

This appeal involves a claim by Joanne Burr ("Burr"), brought under 42 U.S.C. § 1983, that the actions of the Hasbrouck Heights Police Department ("HHPD") and two of its Officers violated her Fourth Amendment rights. After concluding that the Officers were entitled to qualified immunity, the District Court granted defendants' motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and will affirm.

I.

We write only for the benefit of the parties and therefore will limit our discussion to those facts that are material to the disposition of this appeal. On the evening of October 15, 2000, the HHPD received a noise complaint. The caller, who did not identify herself, stated that loud music was coming from a residence that turned out to be Burr's home. Officer George Netelkos ("Netelkos") was dispatched to investigate. Netelkos testified that after arriving at the residence, he knocked on the door and rang the doorbell for approximately one minute. After failing to receive a response, he opened the unlocked door and entered the residence to abate the putative nuisance and to "make sure everything was okay in there." App. at 38. Netelkos followed the sound of the music to a room on the second floor, where Burr was sitting alone. Netelkos began questioning her. At some point during the questioning, Burr's somewhat bizarre behavior and the smell of alcohol suggested to Netelkos that she would not be safe

if left alone. Moreover, Burr concedes that Netelkos knew of her from a previous disturbance-of-the-peace complaint, a recent spate of domestic violence between Burr and her sister, and numerous episodes of "eccentric, albeit benign, interaction" between Burr and law enforcement within the previous five to six-month period. App. Br. at 16. Officer Corey Lange arrived to provide assistance, and Burr was removed by EMS to the Bergen Regional Medical Center.

Lab tests determined that Burr's blood alcohol level was .213, well above the legal limit. Burr does not dispute that she had been drinking alcohol, listening to religious music, and "singing to God." ASA at 246. A doctor at the hospital prescribed 5 mg.s' of Haldol, an anti-psychotic used to manage hyperactivity, mania, and agitation and 2 mg.s' of Ativa, for anxiety. Burr refused the medication.

Burr also underwent a psychiatric assessment. The doctor diagnosed alcohol abuse, and probable alcohol-induced mood disorder with manic features. Burr was released seven hours after admission.

These basic facts are generally not in dispute although the parties have surely put their own spin on them.

II.

We exercise *de novo* review of the District Court's grant of summary judgment. *See Kopec v. Tate,* 361 F.3d 772, 775 (3d Cir.2004). A grant of summary judgment is proper when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the record, we draw inferences from the underlying facts in the light most favorable to Burr, as the party opposing the motion. *See Kopec,* 361 F.3d at 775. In addition, when Burr's allegations conflict with those of officers, we take her allegations as true if supported by proper proofs. *See id.*

III.

In her complaint, Burr charged Officers Netelkos and Lange with various common law causes of action, including assault and battery and false imprisonment, and various violations of her constitutional rights. She invoked *respondeat superior* liability as to the HHPD. Despite the wide ranging claims in her complaint, Burr's appeal focuses on the grant of summary judgment to Netelkos and Lange for their alleged violations of her constitutional rights. She primarily focuses on the warrantless entry by Netelkos and, to a lesser extent, the alleged excessive use of force by Netelkos and Lange,[1] both claimed to be in violation of her Fourth Amendment rights.

A. *Qualified Immunity*

Section 1983 provides a remedy for the deprivation of rights secured by the Constitution and federal law.

1. Also, in the most summary fashion possible and citing no relevant law, Burr concludes that Netelkos and Lange "effectively arrested" her and wrongly caused her to be confined in the hospital. We conclude that, given the circumstances, it was reasonable for Officers Netelkos and Lange to believe that Burr posed an imminent threat of bodily harm at least to herself, even if the Officers were wrong. Thus, there was no violation of Burr's constitutional rights.

See Gonzaga Univ. v. Doe, 536 U.S. 273, 285, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). A prima facie case under section 1983 requires a plaintiff to demonstrate that a person acting under color of state law deprived him or her of a federal right. It is undisputed that, during the events at issue here, the Officers were acting under color of state law.

Government officials performing discretionary functions are generally entitled to qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (quotation and citation omitted). The Supreme Court has emphasized that it is "an *immunity from suit* rather than a mere defense to liability." *Id.* (quotation and citation omitted). Even so, a government official has the burden of establishing that he is entitled to such immunity. *See Kopec*, 361 F.3d at 776.

When considering an officer's defense of qualified immunity, we must examine, as a threshold matter, whether the facts alleged, taken in the light most favorable to the plaintiff, violated a constitutional right. *Saucier*, 533 U.S. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If, however, it has been shown that a constitutional right has been violated, it must be determined whether the right was clearly established in the specific context of the case. *See Brosseau v. Haugen*, 543 U.S. __, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004) (per curiam); *see also Saucier*, 533

U.S. at 202 (noting that an officer is entitled to qualified immunity unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"). In order to determine if the law was clearly established, we must examine "whether the state of the law at the time the violation occurred" gave defendants "fair warning that their alleged treatment [of the plaintiff] was unconstitutional." *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

1. *Warrantless Entry*

The District Court held that Burr cannot establish a claim based on warrantless entry because Netelkos' conduct was objectively reasonable and he was entitled to prevail on a qualified immunity defense. The Court relied on the Sixth Circuit's decision in *United States v. Rohrig,* 98 F.3d 1506, 1519-22 (6th Cir.1996), which extrapolates from *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), and *People v. Lanthier,* 5 Cal.3d 751, 97 Cal.Rptr. 297, 488 P.2d 625 (1971), that an officer's "community care taking function" permits a warrantless entry of a home in order to abate a nuisance.[2] The Sixth Circuit used *Cady's*

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2. In *Rohrig,* two police officers received a noise complaint sometime after 1:30 a.m. Shortly after arriving on the scene, "somewhere between four and eight pajama clad neighbors emerged from their homes to complain about the noise." *Id.* at 1509. The officers, in an effort to abate the nuisance, began knocking on the front door. The officers did not receive a response, so they began to shout into the house in order to gain the attention of the occupant. No one ever came to the door, so the officers opened the unlocked door and entered the home to search for the source of the nuisance.

"community care taker" rationale and fashioned a new exigency exception-the police may enter a home without a warrant in order to abate an ongoing nuisance occurring in the late night-early morning hours. The *Rohrig* Court explained that the officers' warrantless entry did not violate the Fourth Amendment because "a compelling governmental interest supports warrantless entries where, as here, strict adherence to the warrant requirement would subject the community to a continuing and noxious disturbance for an extended period of time without serving any apparent purpose." *Id.* at 1522.

None of our sister courts of appeals has followed *Rohrig* in a published opinion, and we see no need to do so because the facts, viewed in the light most favorable to Burr, do not suggest that any disturbance she was creating rose to the level of a "noxious disturbance" that involved an "immediate, ongoing and highly objectionable nuisance." *Rohrig,* 98 F.3d at 1522, 1525 n. 11. We will, therefore, assume that Netelkos's warrantless entry was not reasonable and violated Burr's Fourth Amendment rights.

We turn, then, to whether, given the circumstances, Burr's right to be free from a warrantless entry into her home was clearly established. Burr does not cite any law that states that an officer, responding to a complaint and knowing of recent disturbances, cannot enter a home "to make sure everything was okay." Burr, however, was required to show that the law placed Netelkos on notice that his conduct was unlawful. *See Brosseau,* 125 S.Ct. at 599. "If the law at the time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to

liability or, indeed, even the burdens of litigation." *Id.* Netelkos was entitled to qualified immunity on the warrantless entry claim.

2. *Excessive Force*

Burr alleges that Netelkos and Lange violated her Fourth Amendment rights when they forcefully restrained her while she was in the process of being removed to the hospital. This "manhandling" caused some "small bruises" on her arms. A-209,

"To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable." *Kopec,* 361 F.3d at 776 (citation omitted). The Supreme Court has also repeatedly emphasized that "because police officers are often forced to make split second judgments . . . about the amount of force that is necessary in a particular situation, the reasonableness of the officers' belief as to the appropriate level of force should be judged from that on-scene perspective." *Saucier,* 533 U.S. at 205 (quotation and citations omitted). "The test of reasonableness under the Fourth Amendment is whether under the totality of the circumstances, 'the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations." *Kopec,* 361 F.3d at 776 (quoting *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

Appendix A

The District Court found that the conduct of Officers Netelkos and Lange was objectively reasonable and not a clear violation of Burr's rights. A reasonable officer could well have believed, as the Officers claimed to have believed here, that Burr was attempting to flee to avoid being taken to the hospital. Burr argues that she was not attempting to flee, although in her deposition she testified that, once she was downstairs, she "started for the door." App. at 73. Moreover, two of her neighbors testified that she ran toward the door. The test, of course, is what a reasonable officer would have perceived. Thus, even viewing the facts and reasonable inferences therefrom in Burr's favor, it is fair to say that the Officers observed her running towards the door, and then, to prevent her from fleeing, grabbed her arms and put her on a stretcher. *Id.* As a result, her arms received some "small bruises." These facts do not suggest that the amount of force used was objectively unreasonable. Accordingly, Netelkos and Lange did not violate Burr's rights by forcibly restraining her.

IV.

We will affirm the December 9, 2003 order of the District Court.[3]

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3. Although the District Court did not address in any detail the claims against the HHPD, we note that liability was alleged to be based primarily on principles of *respondeat superior* and, thus, Burr could not have prevailed against the HHPD given the fact that the Officers were entitled to qualified immunity. Burr does not press any claim against the HHPD on appeal.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 9, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 01-3296 (WHW)

JOANNE BURR,

Plaintiff,

v.

HASBROUCK HEIGHTS POLICE DEPARTMENT, GEORGE NETELKOS and COREY LANGE,

Defendants.

OPINION

Walls, District Judge

Defendants move for summary judgment on all claims of Plaintiff's Complaint. Pursuant to Fed. R. Civ. P. 78, this motion is decided without oral argument. The motion is granted.

FACTUAL BACKGROUND

The facts of this case are undisputed. On Sunday, October 15, 2000 at approximately 7:48 p.m., Officer Netelkos of the Hasbrouck Heights Police Department was dispatched

to Plaintiff's residence in response to a neighbor's complaint of loud music. Officer Netelkos could hear music blaring from Plaintiff's residence a block away as he approached the scene. There was no answer to the officer's knock on the front door of the residence. The officer identified himself as "Police" and entered the residence through the unlocked front door. Seeing no one downstairs, Officer Netelkos proceeded upstairs. The music was emanating from a dimly lit room in which Plaintiff was sitting alone, smelling of alcohol and listening and singing to the blaring music. Officer Netelkos informed Plaintiff of the neighbor's noise complaint and asked Plaintiff to accompany him downstairs. Plaintiff refused and asked the officer to leave. Plaintiff claims that the officer grabbed hold of her arm. Plaintiff refused to go anywhere with the officer. Officer Netelkos asked Plaintiff if she would speak to a 262-HELP Counselor but she refused. Based on her behavior and the fact that no one was at home with her, Officer Netelkos decided that Plaintiff should be involuntarily committed to the Bergen Regional Medical Center ("BRMC"). Shortly afterwards, Officer Lange arrived and Plaintiff finally agreed to go downstairs with the officers where she saw emergency personnel with a stretcher. Plaintiff refused to cooperate and started toward the front door of the house. The officers held Plaintiff by her arms so she could not flee and assisted her onto the stretcher. Plaintiff was taken to the BRMC where she was diagnosed as suffering from "alcohol intoxication" and "a probable hypomanic episode secondary to alcohol intoxication."

Plaintiff has filed an eight count Complaint in Federal Court alleging various federal civil rights violations and state law torts against these Defendants. Defendants have filed this motion for summary judgment which Plaintiff opposes.

Appendix B

DISCUSSION

I. Standard

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant and it is material if, under the substantive law, it would affect the outcome of the suit. *See Anderson*, 477 U.S. at 248. The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *See Celotex v. Catrett*, 477 U.S. 317, 318 (1986).

Once the moving party, has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. See *Sound Ship Building Co. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir. 1976), *cert. denied*, 429 U.S. 860 (1976). At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for

trial. See *Anderson*, 477 U.S. at 249. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. *See Wahl v. Rexnord, Inc.* 624 F.2d 1169, 1181 (3d Cir. 1980).

II. Analysis

A. Federal Civil Rights Claims

Plaintiff's claims for federal civil rights violations are barred because Defendants are entitled to "good faith" immunity. When a defendant asserts qualified immunity as an affirmative defense, the initial issue to be determined is whether that defendant is entitled to such immunity. *See D.R. by L.R. v. Middle Bucks Area Vo. Tech. Sch.*, 972 F.2d 1364, 1368 (3d Cir. 1992). The determination of whether a plaintiff's claim is barred by the doctrine of qualified immunity is properly made upon motion for summary judgment. *See Skevofilax v. Quigley*, 586 F.Supp. 532, 538 (D.N.J. 1984). Public officials may be entitled to qualified immunity because "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry focuses on "whether, as an objective matter, a reasonable public official would understand at the time he acted that what he was doing violated those clearly established rules." *Ryan v. Burlington County*, 674 F.Supp. 464, 479 (D.N.J. 1987). Qualified immunity is defeated where an official "knew or reasonably should have known

that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Harlow*, 457 U.S. at 815.

Here Officer Netelkos' actions were objectively reasonable. The officer responded to a neighbor's complaint of loud music and heard that music blaring from Plaintiff's residence while a block away. Officer Netelkos appeared on Plaintiff's doorstep in uniform, knocked on the front door, which was open, and identified himself as "police." When there was no response, the officer entered Plaintiff's house to search for the source of the music. Upstairs, the officer found Plaintiff sitting alone in a dimly lit room listening to the blaring stereo and singing. She smelled of alcohol. No one else was home with Plaintiff. Plaintiff refused to speak to a counselor at 262-HELP and resisted the officer's request to go the Bergen Regional Medical Center for an evaluation. Officer Netelkos made the decision to have Plaintiff involuntarily committed for her own safety. When Plaintiff attempted to flee, the two police officers held her arms and put her on the stretcher. Such conduct was objectively reasonable and not a clear violation of Plaintiff's constitutional rights, nor has Plaintiff demonstrated a "malicious intent" to deprive her of her rights or cause other injury.

Plaintiff argues that Officer Netelkos' warrantless entry into her home violated her Fourth and Fourteenth Amendment rights because the officer lacked probable cause to enter her residence and have her involuntarily committed. This Court

finds the *Rohrig* decision cited by Defendants persuasive. *See U.S. v. Rohrig*, 98 F.3d 1506 (6th Cir. 1986). The *Rohrig* Court found that where a police officer entered a private home without a warrant in the early hours of the morning in response to a neighbor's noise complaint, his actions were reasonable because the officer did not enter the home to search for contraband but to abate an ongoing nuisance. *See id.* at 1515. The *Rohrig* Court applied a three part test to determine whether exigent circumstances existed to effectuate a warrantless entry of a home. The test include three factors: "(1) whether immediate government action was required, (2) whether the governmental interest was sufficiently compelling to justify a warrantless intrusion, and (3) whether the citizens' expectation of privacy was diminished in some way." *Id.* at 1521. The Court found that arrival at a scene where loud music was playing required an immediate response; entering defendant's residence for the purpose of locating and abating a public nuisance was an important government interest; and the defendant's interest in maintaining the privacy of his home was weakened in light of the governmental interest in preserving a peaceful community, particularly considering that the defendant "undermined his right to be left alone by projecting loud noises into the neighborhood." *Id.* at 1521-1522.

Similarly, the Hasbrouck police department received an excessive noise complaint. Officer Netelkos arrived at Plaintiff's house where the music could be heard from a block away. He knocked on the door and announced "police." When there was no response, the officer entered the unlocked house to locate and abate the nuisance. In these circumstances, the government interest in preserving a peaceful community

weakened Plaintiff's privacy interest in her home as she was "projecting loud noises into the neighborhood." Officer Netelkos' entry into Plaintiff's home to locate and abate the noise nuisance was reasonable and did not require a warrant. Plaintiff's claims for federal civil rights violations are barred because Defendants are entitled to "good faith" immunity.

B. New Jersey State Law Claims

Both public entities and public employees are immune from liability as to claims under New Jersey state law for the "good faith" execution and enforcement of laws pursuant to N.J.S.A. 59:2-2(b) and N.J.S.A. 59:3-3 which parallels the good faith immunity articulated by the United States Supreme Court in *Harlow*. N.J.S.A. 59:2-2(b) states "A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." New Jersey statutory law provides immunity from civil liability for law enforcement officers arising from performance of their duties. N.J.S.A. 59:3-3 provides immunity to a public employee "if he acts in good faith in the execution or enforcement of any law." New Jersey law mandates that a "law enforcement officer shall take custody of a person and take the person immediately and directly to a screening service if: . . . [o]n the basis of personal observation, the law enforcement officer has reasonable cause to believe that the person is in need of involuntary commitment." N.J.S.A. 30:4-27.6. In conjunction with this involuntary commitment law, N.J.S.A. 30:4-27.7 states that "[a] law enforcement officer, . . . acting in good faith pursuant to this act takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental

health assessment or treatment is immune from civil and criminal liability." The legislature provides this immunity in addition to the immunities in the Tort Claims Act. *See Blunt v. Klapperoth*, 309 N.J. Super. 493, 503 (App. Div. 1998); *Perona v. Township of Mullica*, 270 N.J. Super. 19, 25 (App. Div. 1994). Even where police officers were mistaken when making a discretionary decision not to involuntarily commit someone, the court granted immunity because the officers did not have "reasonable cause to believe" that the plaintiff was in need of involuntary commitment. *See Perona*, 270 N.J. Super. at 30.

Here Defendants are immune from civil liability regarding Plaintiff's state law claims because Officer Netelkos had reasonable cause to believe that Plaintiff was in need of involuntary commitment based upon his observation that Plaintiff posed a danger to herself and others. Officer Netelkos found Plaintiff sitting alone in a dimly lit room, smelling of alcohol, singing and listening to music which was loud enough to be heard from a block away while dinner was cooking on the stove downstairs. No one else was at home and Plaintiff was uncooperative with Officer Netelkos and Officer Lange. Officer Netelkos called 262-HELP, but Plaintiff refused to talk to the counselor. Based on these facts, Officer Netelkos decided to involuntarily commit Plaintiff. When Plaintiff attempted to flee, the two police officers held her arms and put her on the stretcher. Defendants are entitled to immunity under N.J.S.A 59:2-2(b) and N.J.S.A. 30:4-27.7 because the record demonstrates that both Officer Netelkos and Lange were acting in good faith in the enforcement of New Jersey's involuntary commitment statute.

Appendix B

CONCLUSION

Plaintiff's motion for summary judgment is GRANTED.

s/ William H. Walls
William H. Walls, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 17, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1121

JOANNE BURR,

Appellant

v.

HASBROUCK HEIGHTS POLICE DEPARTMENT; GEORGE NETELKOS; COREY LANGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 01-cv-03296
District Judge: The Honorable William H. Walls

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and COWEN* *Circuit Judges*

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* Limited to panel rehearing only.

Appendix C

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryanne Trump Barry
Circuit Judge

Dated: June 17, 2005

Supreme Court, U.S.
FILED
OCT 11 2005
OFFICE OF THE CLERK

No. 05-313

In The Supreme Court of the United States

JOANNE BURR,

Petitioner,

v.

HASBROUCK HEIGHTS POLICE DEPARTMENT; GEORGE NETELKOS; and COREY LANGE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondents object to Petitioner's Questions Presented and offer the following as the correct issues to be considered:

1. Whether Petitioner meets the standards required for this Court to grant a Writ of Certiorari.

2. If this Court does grant a Writ of Certiorari, whether Petitioner stated a cognizable claim for a violation of any clearly established constitutional right as a matter of law.

3. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment in Respondents' favor based on qualified immunity since Respondents' actions were objectively reasonable and Petitioner did not establish a violation of any clearly established constitutional right.

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RULE

U.S. Sup. Ct. Rule 10 8

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment affirming the grant of summary judgment to the Hasbrouck Heights Police Department, George Netelkos and Corey Lange by the United States District Court for the District of New Jersey on May 17, 2005. A Petition for rehearing *en banc* was denied by the Court of Appeals on June 17, 2005. On September 9, 2005, a Petition for A Writ of Certiorari was filed by Petitioner pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This Brief is submitted on behalf of Respondents Hasbrouck Heights Police Department ("Police Department"), and Police Officers George Netelkos ("Netelkos") and Corey Lange ("Lange") (collectively, referred to as "Respondents"). Respondents object to Petitioner's Statement of the Case because it contains irrelevant material and does not set forth the material facts necessary to the consideration of the questions presented. Respondents, therefore, offer their own Statement of the Case.

Petitioner commenced an action in the United States District Court for the District of New Jersey against Respondents by filing a Complaint alleging various common law causes of action, including assault and battery and false imprisonment, and violations of her civil rights under 42 U.S.C. § 1983.

Petitioner's Complaint arises from an objection to her involuntary commitment to the Bergen Regional Medical Center ("BRMC") for psychological evaluation by Netelkos

pursuant to N.J.S.A. 30:4-27 based upon his perception as a police officer that Petitioner presented a danger to herself and to others. The undisputed facts of this case demonstrate that on Sunday, October 15, 2000 at approximately 7:48 p.m., Netelkos was dispatched to Petitioner's residence to respond to neighbors' complaints of loud music. As Netelkos approached the scene, he heard the music from a block away from Petitioner's residence. Netelkos went to the front door of the residence where the blaring music was emanating from and knocked on the door. Netelkos received no response to his announcement and since the front door was unlocked and open, he entered while identifying himself as "Police." Again, there was no answer to his calls. Seeing no one downstairs, Netelkos proceeded upstairs where the music was coming from in order to abate the nuisance and check on the welfare of the occupant.

Netelkos entered a dimly lit room with a candle burning and found Petitioner sitting alone, smelling of alcohol and listening to blaring music. Netelkos caused the music to be turned down and asked Petitioner to accompany him downstairs. Petitioner refused and began quoting from the Bible. Petitioner was then again asked to come downstairs and this time she acquiesced. Netelkos dialed 262-HELP to speak with a counselor in order to determine whether to involuntarily commit Petitioner to the BRMC for psychological evaluation.

Based upon Petitioner's erratic behavior and the fact that no one was at home with Petitioner, the counselor at 262-HELP agreed that Petitioner should be involuntarily committed to the BRMC. Police Officer Lange subsequently arrived at the scene to assist Netelkos. An ambulance was called and EMTs entered the house with a

stretcher. Petitioner did not want to be transported into the ambulance and resisted being placed in a stretcher. Plaintiff admits that she ran for the door and eyewitnesses corroborate that Petitioner resisted and tried to flee the scene. Petitioner was then transported to BRMC for evaluation.

BRMC determined that Petitioner's blood alcohol level was .213. At her deposition, Petitioner admitted to drinking at least two scotches and an unidentified amount of wine within two to three hours prior to the Officers' arrival. Petitioner was diagnosed by BRMC as suffering from alcohol abuse and a probable hypo manic episode. She was released to her family's care three hours later. Petitioner received minimal treatment following the incident and, shortly thereafter, stopped treatment altogether.

Both state and federal law immunizes Respondents from liability for their discretionary decisions as public officials in exactly this type of situation. Accordingly, Respondents moved for summary judgment. The District Court subsequently granted Respondents' summary judgment motion and dismissed Petitioner's Complaint in its entirety with prejudice. The District Court held that Netelkos and Lange were entitled to qualified immunity since their actions were objectively reasonable and were not a clear violation of Petitioner's constitutional rights.

Petitioner filed an appeal of the District Court's judgment. On May 7, 2005, the United States Court of Appeals for the Third Circuit ("Court of Appeals") affirmed the decision of the District Court. In affirming the District Court, the Court of Appeals held that Respondents were

entitled to qualified immunity and that Petitioner had not shown that a clearly established right was violated.

The Court of Appeals found that Netelkos' actions were objectively reasonable based upon Petitioner's behavior. That Court further opined that "given the circumstances, it was reasonable for Officers Netelkos and Lange to believe that Burr posed an imminent threat of bodily harm at least to herself, even if the Officers were wrong. Thus, there was no violation of Burr's constitutional rights." The circumstances alluded to by the Court of Appeals included Petitioner's bizarre behavior and Netelkos' prior knowledge of past episodes of "eccentric, albeit, benign, interaction" between Petitioner and the Hasbrouck Heights Police Department within a six month period.

Netelkos was faced with a situation where a woman with a prior history of somewhat bizarre behavior was visibly intoxicated, sitting alone in a candle lit room, acting irrationally, quoting from the Bible and listening to extremely loud music. Petitioner had also left food cooking on the stove on another floor of the house. Petitioner resisted an opportunity to voluntarily seek assistance. Although Netelkos could have issued a summons to Petitioner for her blatant violation of the Borough's noise ordinance, he did not do so and took greater interest in Petitioner's well-being. Based upon the Netelkos' judgment, and the fact that there were no family members or other individuals at home to care for Petitioner, Netelkos decided that involuntary commitment was the most prudent course of action based upon the circumstances. Both the District Court and Court of Appeals agreed with Netelkos' assessment of the situation and found his actions to be objectively reasonable. As a result, both federal courts properly affirmed the grant of

summary to Respondents based on qualified immunity and dismissed Petitioner's complaint in its entirety.

SUMMARY OF THE ARGUMENT

Petitioner has continued to attempt to transform her claim that she was wrongfully committed for psychological evaluation pursuant to New Jersey statute based upon well-founded concerns for her own safety into a claim of urgent constitutional magnitude. As the District Court correctly held, Plaintiff has failed to establish as a matter of law that her constitutional rights were violated under the circumstances. The opinion of the Court of Appeals affirming the District Court raises no issue justifying review by this Court. In fact, Petitioner offers no legal precedent or coherent argument as to why the pending Petition for a Writ of Certiorari should be granted. Therefore, Petitioner's request for review should be denied.

The sole issue addressed by Petitioner in its Petition to this Court for a Writ of Certiorari is whether Respondents are entitled to qualified immunity. Both the District Court and the Court of Appeals properly found that Respondents were in fact entitled to application of qualified immunity as a matter of law.

In order to prevail on a claim under 42 U.S.C. § 1983, the United States Court of Appeals for the Third Circuit holds that a plaintiff must first demonstrate that the challenged conduct was committed by persons acting under color of state law and that the conduct deprived plaintiff of a right, privilege, or immunity secured by the Constitution or federal law. *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255-56 (3d Cir. 1994). However, when a

defendant asserts the affirmative defense of qualified immunity this Court has opined that the initial issue to be determined is whether the defendant is entitled to such immunity. *Harlow v. Fitzgerald* 457 U.S. 800 (1982); *see also D.R. by L.R. v. Middle Bucks Area Vo. Tech. Sch.*, 972 F.2d 1364, 1368 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1992).

This Court has also opined that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 810. Qualified immunity is only defeated where an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815. The qualified immunity inquiry focuses on "whether, as an objective matter, a reasonable public official would understand at the time he acted that what he was doing violated those clearly established rules." *Ryan v. Burlington County*, 674 F. Supp. 464, 479 (D.N.J. 1987).

Petitioner's argument that Respondents' actions cannot be deemed objectively reasonable is not supported by any competent evidence in the record. In the same sweeping, conclusory manner that was proffered to the courts below, Petitioner broadly contends that the lower courts erred in dismissing the Complaint. Petitioner does not contest the legal principles applied by the Court of Appeals. Nor does Petitioner suggest that the decision is in conflict with or unsupported by the decisions of other

Circuits. Petitioner tries to take another "bite at the apple" and simply wants this Court to re-examine her case to determine whether her unsupported allegations were sufficient to withstand Respondents' summary judgment motion without meeting the requirements necessary for this Court to grant a Writ of Certiorari.

Respondents' actions were objectively reasonable and taken in good faith in order to attempt to protect Petitioner. Netelkos was faced with a situation where a visible intoxicated woman, with a prior history of bizarre behavior, sitting alone in a dim candle lit room, quoting from the Bible and listening to extremely loud music, resisted an opportunity to voluntarily seek assistance. Based upon Petitioner's behavior and prior history coupled with the fact that there were no family members or other individuals at home to care for Petitioner, Netelkos decided that an involuntary commitment was the most prudent course of action after consulting with a 262-HELP counselor. Netelkos' decision to commit Petitioner was based on several factors, including Petitioner's erratic behavior at the scene and prior history with the Police Department, not just her apparent intoxication. Under the circumstances, it was objectively reasonable for Netelkos to conclude that Petitioner was a danger to herself and to others in accordance with N.J.S.A. 30:4-27.1, *et seq*. The District Court and Court of Appeals properly agreed with Netelkos' assessment of the situation.

Petitioner also argues that this Court should clarify the limits of the "community care taking function" since this Petition allegedly presents an appropriate record to do so. This Petition provides no such record since the Court of Appeals properly found that the doctrine was not applicable to the instant matter. The Court of Appeals properly

affirmed the grant of summary to Respondents based on application of qualified immunity and not the "community care taking function" doctrine. In this vein, the Court of Appeals in agreeing with the District Court properly held that there was no violation of a clearly established constitutional right and under the above-described circumstances, Respondents' actions were objectively reasonable.

Petitioner has cited no conflict with a decision of this Court, or any other Circuit, that the Court of Appeals failed to follow with regards to the warrantless entry or the application of qualified immunity. Accordingly, the decision of the Court of Appeals raises no "compelling" reason warranting review. *See* U.S. Sup. Ct. Rule 10. Therefore, the pending petition for Writ of Certiorari should be denied.

LEGAL ARGUMENT

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. U.S. Sup. Ct. Rule 10. A petition for a Writ of Certiorari will be granted by this Court only for compelling reasons. *Id.* This Court will generally grant certiorari only to resolve a conflict among the Courts of Appeals, or to resolve a conflict between the decision of a state court or a Court of Appeal regarding an important federal question that conflicts with a decision of this Court. *Id.* Here, Petitioner has cited no conflict with a decision of this Court or a conflict among the Courts of Appeals regarding any issue material to this case. As a result, there are no "compelling reasons" warranting this Court's review.

A. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS APPROPRIATE AND DOES NOT RAISE ANY COMPELLING REASON WARRANTING REVIEW BY THIS COURT.

The decision of the Court of Appeals affirming the dismissal of Petitioners' claims was correct and does not raise any direct conflict in opinions of other Circuits regarding any issue that is material to disposition of this case. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity is only defeated where an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815. Courts specifically hold that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Malloy v. Briggs*, 475 U.S. 335, 341 (1986). Furthermore, "if reasonable public officials could differ on the lawfulness of defendant's actions, the defendant is entitled to qualified immunity." *Id.*

When considering a qualified immunity defense, the court must first determine whether plaintiff's constitutional rights were violated. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). If the court does find a constitutional violation, it must then determine whether plaintiff's rights were clearly established. *Id.* at 202. However, a public employee

need only show the "objective reasonableness of his conduct" in order to avail himself of the shield of "good faith" immunity and to obtain summary judgment in a civil suit for damages under 42 U.S.C. § 1983 or federal civil rights law. *Harlow v. Fitzgerald*, 457 U.S. at 807.

The Court of Appeals correctly concluded that Petitioner's Complaint should be dismissed on the basis of Respondents' qualified immunity, because Petitioner failed to demonstrate a violation of any clearly established constitutional right. Not only did Petitioner fail to establish a violation of a clearly established constitutional right, but Respondents have demonstrated that the Officers' actions were objectively reasonable.

In accordance with the Police Department's policy, Netelkos called 262-HELP from Petitioner's telephone to request assistance but Petitioner refused to speak to a counselor. Netelkos was told by 262-HELP that they would not be able to get a counselor to the location for several hours. Netelkos was faced with a visibly intoxicated woman, with a prior history of bizarre behavior, sitting alone in a dim room lit only by a candle, quoting from the Bible and listening to extremely loud music, resisting an opportunity to voluntarily seek assistance. At the time of the incident, Petitioner was alone and she had left a meal cooking on the stove on another floor of the house. Under the circumstances, it was objectively reasonable for Netelkos to conclude that Petitioner was in need of psychological evaluation pursuant to the involuntary commitment statute. Netelkos acted in good faith since he felt that he could not, in good conscience, leave Petitioner alone as he believed that she was a danger to herself and to others.

Netelkos radioed for an ambulance immediately prior to Officer Lange's arrival at the scene. Upon his arrival, Lange heard Petitioner screaming upstairs. Lange went upstairs and saw Petitioner sitting in the room with candles burning around her. While Netelkos and Lange waited for the ambulance to arrive for approximately ten minutes, both Officers, as well as neighbors and family members, tried to tell Petitioner to relax, to calm down and that they were both there to help her but Petitioner was extremely agitated, adamantly opposed to going to the hospital and acted in a way that looked like she was going to harm herself. Lange testified that Petitioner did not answer questions that were posed to her and he smelled alcohol emanating from her.

Upon the ambulance's arrival, Netelkos and Lange assisted Petitioner downstairs since they were concerned for her welfare. While the Officers tried to bring Petitioner downstairs, she flailed her arms and tried to hit the Officers. Petitioner also admitted that she tried to flee and "started towards the door." Eyewitnesses also observed her attempt to flee the scene. While attempting to place Petitioner on a stretcher, she cursed, screamed and resisted being placed in the ambulance. The EMS, neighbors and family members were on the scene trying to convince Petitioner that the police were only trying to help her. Although family members and neighbors were present, no one attempted to stop her from being taken to BRMC in an ambulance or even questioned the decision to take her from the scene.

A reasonable police officer faced with the same circumstances as Netelkos would believe that he was acting properly by involuntarily committing Petitioner in accordance with N.J.S.A. 30:4-27.1, *et seq*. Moreover, even if

Netelkos mistakenly concluded that his actions were lawful, he is afforded qualified immunity since he reasonably believed that his actions were lawful. *Ryan*, 674 F. Supp. at 479 (holding that "[e]ven if a public official mistakenly concludes that what he or she is doing is lawful, as long as the official reasonably believes that his or her conduct was lawful, the official should not be held personally liable."). Both Officers believed that they were acting in good faith at the time of this incident and in accordance with the Police Department's policy which requires adherence to New Jersey state law with regard to involuntary commitments. Netelkos decided to involuntarily commit Petitioner to BRMC pursuant to N.J.S.A. 30:4-27.1, *et seq.* because he believed that Plaintiff was dangerous to herself and to others. Netelkos based his decision on several factors, not just her apparent intoxication.

The District Court agreed and found that Netelkos' actions were objectively reasonable based upon Petitioner's behavior. The Court of Appeals, in affirming the District Court, found that "given the circumstances, it was reasonable for Officers Netelkos and Lange to believe that Burr posed an imminent threat of bodily harm, at least to herself, even if the Officers were wrong. Thus, there was no violation of Burr's constitutional rights."

The Court of Appeals acknowledged that "Burr's somewhat bizarre behavior and the smell of alcohol suggested to Netelkos that she would not be safe if left alone." Moreover, the Court of Appeals acknowledged that Burr concedes that Netelkos knew of her from a previous disturbance-of-the-peace complaint, a recent spate of domestic violence between Burr and her sister, and numerous episodes of "eccentric, albeit benign, interaction"

between Burr and law enforcement within the previous five to six month period.

Lab tests determined that Burr's blood alcohol level was .213, well above the legal limit. Burr did not dispute that she had been drinking alcohol, listening to religious music and "singing to God." A doctor at the BRMC prescribed 5 mg. of Haldol, an anti-psychotic used to manage hyperactivity, mania, and agitation and 2 mg. of Ativa, for anxiety. Burr also underwent a psychiatric assessment. The doctor diagnosed alcohol abuse, and probable alcohol-induced mood disorder with manic features.

The Court of Appeals then held that Petitioner was required to show that the law placed Netelkos on notice that his conduct was unlawful. Although not argued below, Petitioner's attempt to now point to the definition section of N.J.S.A. 30:4-27.2 to try and show that Netelkos had the required notice that his conduct was unlawful is misguided. Netelkos' decision to commit Petitioner was based on several factors, not just her apparent intoxication. Those factors included a police officer faced with a visibly intoxicated woman, with a prior history of bizarre behavior, sitting alone in a dim room lit only by a candle, quoting from the Bible and listening to extremely loud music, resisting an opportunity to voluntarily seek assistance. At the time of the incident, Petitioner was alone in the house and had left food on the stove cooking on another floor of the house. Under the circumstances, it was objectively reasonable for Netelkos to conclude that Petitioner was a danger to herself and to others in accordance with N.J.S.A. 30:4-27.1, *et seq*. The District Court and Court of Appeals agreed with Netelkos' assessment of the situation.

Petitioner also argues that this Court should clarify the limits of the "community care taking function" since this petition presents an appropriate record to do so. However, this Petition provides no such record since the Court of Appeals found that the doctrine was not applicable to the instant matter.

Instead, the Court of Appeals, in agreeing with the District Court, held that there was no violation of Petitioner's constitutional rights since under the above-described circumstances "it was reasonable for Officers Netelkos and Lange to believe that Burr posed an imminent threat of bodily harm at least to herself. . . ."

The Court of Appeals ultimately held that Petitioner failed to show that her rights were clearly established. In this regard, the Court of Appeals properly held that Petitioner "failed to cite any law that an officer, responding to a complaint and knowing of recent disturbances, cannot enter a home 'to make sure everything was okay.'" As a result, the Court of Appeals properly affirmed the grant of summary to Respondents based on a proper application of qualified immunity and not the "community care taking function" doctrine.

Petitioner has also failed to demonstrate that the Court of Appeals misapplied the doctrine of qualified immunity. The Court of Appeals appropriately determined that Respondents were entitled to qualified immunity because Petitioner alleged violations of rights that were not "clearly established" at the time the conduct at issue occurred. That decision is correct, and does not warrant this Court's review.

Once again, Petitioner has cited no conflict with a decision of this Court on the issue of qualified immunity.

Nor did Petitioner establish any conflict among the other Circuit Courts of Appeals on these issues. Since Petitioner has failed to meet the standard required to be afforded the privilege of review by this Court by way of granting a Writ of Certiorari, the within Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Petitioner's Petition for a Writ of Certiorari be denied.

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Dated: October 10, 2005